

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Basic Service Tier Encryption |) | MB Docket No. 11-169 |
| |) | |
| Compatibility Between Cable Systems and |) | PP Docket No. 00-67 |
| Consumer Electronics equipment |) | |
| |) | |

**REPLY COMMENTS OF
THE NEW JERSEY DIVISION OF RATE COUNSEL**

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SUMMARY

The New Jersey Division of Rate Counsel (“Rate Counsel”) as an agency representing New Jersey consumers submits that the proposed conditions set forth in Section 76.630(a)(1)(ii), (iii), and (iv) are inadequate to afford consumer protection to the public. Rate Counsel hereby supplements its Initial Comments filed on November 28, 2011. While elimination of the prohibition on encryption of the basic tier may benefit cable operators when systems are all-digital, the cost should not be borne by cable customers. Rate Counsel echoes the sentiments of other commentators which ask that further modifications and clarifications be made to the section to ensure that the transition does not unfairly burden low-income consumers. Therefore, Rate Counsel urges the Commission to:

- 1) require operators to provide the cost savings data and projected increased revenue data from enhanced digital offerings due to increased bandwidth post encryption, as well as the number of subscribers, households and public institutions which would be affected in their footprints and the number of units/set-top boxes or devices that these subscribers would need to continue to receive uninterrupted basic service tier channels on all existing television sets at these locations;
- 2) require operators to provide the equipment necessary to view the basic service tier for all television sets at no cost as long as consumers have television sets that require equipment to view the encrypted basic service tier and as long as the basic service tier remains encrypted given the estimated billions of dollars in cost savings and benefits cable operators will experience if permitted to encrypt the basic service tier;
- 3) prohibit equipment fee charges on consumers and require that any equipment needed be provided at no cost to consumers. If the FCC permits charges on consumers such charges should be subject to review by the Local Franchise Authority (“LFA”) in the FCC Form 1205 process under Section 623(b)(3)(A)¹; or reviewable by the FCC where the LFA no longer has authority to review rates, to require that costs be allocated to all services benefiting from the availability of

¹ / 47 U.S.C. § 543(b)(3)(A).

additional bandwidth in accordance with Section 623(a)(6)² and Section 623 (j)³; and

- 4) utilize the approach currently employed by the Lifeline/Linkup Program to determine eligibility; and participants should receive any required equipment at no charge and with no time limitation imposed.
- 5) ensure that PEG programming is protected by not permitting a cable operator to charge a PEG operator/programmer to have its PEG programming encrypted.

² / 47 U.S.C. § 543 (a)(6).

³ / 47 U.S.C. § 543 (j).

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**REPLY COMMENTS OF
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I. INTRODUCTION

The New Jersey Division of Rate Counsel (“Rate Counsel”) as an agency representing New Jersey consumers submits Reply Comments based on its review of initial comments filed on November 28, 2011, by numerous interested parties in response to the Notice of Proposed Rulemaking (“Notice”) issued by the Federal Communications Commission’s (“FCC” or “Commission”) on October 14, 2011.⁴ The Notice proposed rules to require operators of all-digital cable systems that elect to encrypt the basic service tier to comply with certain consumer

⁴ / Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. The Rate Counsel, formerly known as the New Jersey Ratepayer Advocate, is in, but not of, the Department of Treasury. *N.J.S.A.* §§ 52:27EE-46 *et seq.*

protection measures for a limited period of time in order to minimize potential subscriber disruption.⁵

II. ISSUES FOR COMMENT

A. Cable Operators Must Quantify the Number of Subscribers Affected and Cost Savings and Cost Savings Should Be Passed Down to Subscribers.

Should the FCC allow cable operators to encrypt the basic service tier, subscribers should not lose the ability to view the encrypted basic service tier service on any television set that they may have, and the equipment necessary to view should be at no cost and without any time limitation. As stated by commenter Montgomery County, Maryland, encryption of the basic service tier offers few benefits and places unjustified burdens on cable subscribers who are least able to afford them.⁶ It is not surprising that the industry fervently argues for the authority to encrypt, for it is a win-win situation for cable operators. Encryption offers major benefits and substantial cost savings to cable operators, such as elimination of many service appointments, fewer truck rolls, enhanced security for the operator against theft of services,⁷ and increased bandwidth, all subsidized on the backs of captive cable subscribers. Comments filed by Comcast

⁵ / *In the Matter of Basic Service Tier Encryption Compatibility Between Cable Systems and Consumer Electronics Equipment*, MB Docket No. 11-169, PP Docket No. 00-67, Notice of Proposed Rule Making, released October 14, 2011 (“NPRM”) at ¶ 1 and ¶¶ 11-13 and Appendix A.

⁶ / *In the Matter of Basic Service Tier Encryption Compatibility Between Cable Systems and Consumer Electronics Equipment*, MB Docket No. 11-169, PP Docket No. 00-67, Notice of Proposed Rule Making, released October 14, 2011 (“NPRM”), Comments of Montgomery County, Maryland at p. 1 ¶ 1, dated November 28, 2011.

⁷ / *Id.*, Comments of Time Warner Cable Inc., at pp. 3-5 details the multitude of benefits to operators however fails to provide costs savings data or any information on how these savings will be “reinvested” to better serve their actual subscribers,” at p. 5 ¶ 1. Similarly, RCN Telecom Services LLC, comments on the cost savings without providing financial savings data and provides no information on the estimated harm to subscribers with two or more sets, pp. 4-5, dated November 28, 2011.

demonstrate that encryption would save Comcast “nearly \$5 billion in unrealized revenue (more than 8% of gross industry revenues in the year of the study) by theft of services alone.”⁸ Similarly, Cablevision noted “a comprehensive study that found that \$58 billion is lost to the U.S. economy annually due to content theft.”⁹ Operators also boast substantial additional efficiencies due to fewer truck rolls.¹⁰ Comcast states that encryption of its basic service tier in all-digital systems will “reduce truck rolls to disconnect by 90% and by 45% to reconnect, eliminating thousands or even millions of truck rolls in Comcast’s all-digital systems,”¹¹ thereby also “reducing costs related to “wear-and-tear” on the lines and the need for maintenance.”¹² Similarly, Cablevision reported “it performed 99.5% of all disconnects remotely in the 401,000 household area in New York City thereby reducing its’ disconnect truck rolls in that area by 19,099 during the period from August 2011 through the end of October 2011.”¹³ Encryption will also expand the revenue source for cable operators as they will be able to offer more high-definition programming, faster Internet and new IP-based cable service packages at increased prices when bandwidth previously dedicated to analog channels is freed. In New Jersey Rate Counsel notes a recent press release by Comcast which states:

⁸ / *In the Matter of Basic Service Tier Encryption Compatibility Between Cable Systems and Consumer Electronics Equipment*, MB Docket No. 11-169, PP Docket No. 00-67, Notice of Proposed Rule Making, released October 14, 2011 (“NPRM”), Comments of Comcast Corporation, at p. 9 and fn 23, dated November 28, 2011.

⁹ / *Id.*, Comments filed by Cablevision Systems Corporation, pp. 7-11 and fn 17, dated November 28, 2011.

¹⁰ / *Id.*, Comments of Time Warner Cable, Inc., “...dramatic reduction in service calls and associated costs... will flow from the flexibility that encrypted digital basic service will provide to cable operators,” pp. 3-4. See also Comments of RCN Telecom Service, LLC, “encrypting the basic service tier...to prevent theft of basic cable service and avoid expensive, time-consuming, and pollution-causing home visits,” p. 4, dated November 28, 2011.

¹¹ / *Id.*, Comments of Comcast Corporation pp. 6-8, dated November 28, 2011.

¹² / *Id.*, Comments of Comcast Corporation p. 11.

¹³ / *Id.*, Comments of Cablevision Systems Corporation, p. 12.

“This year, Comcast, which provides cable TV service to parts of Monmouth and Ocean counties, has rolled out its World of More digital enhancements. The changes included requiring a digital adapter or set-top box for its expanded basic channels and limited basic channels, encompassing those from channel 2 to 100. The move would triple the space on the cable company’s network that it uses to pipe entertainment and services to its customers, the company said.”

Asbury Park Press, “*Comcast adds new channels with digital enhancements*,” by: David P. Willis, posted on: November 16, 2011.¹⁴

Rate Counsel submits that given the magnitude of the cost savings and potential increased revenue sources implicated by expanded bandwidth offerings that operators will experience by encryption of the basic service tier, the cost savings should be passed on to subscribers in terms of lower rates and that no equipment fees should be imposed on consumers. Clearly the benefits that flow to cable operators are more than adequate to enable cable operators to provide equipment at no charge and therefore, the FCC should adopt Rate Counsel’s recommendations.

B. The Commission Must Address the Potential Negative Impact that Encryption Will Pose on Institutional Subscribers and on PEG Programming.

Rate Counsel echoes the concerns addressed by Alliance for Community Media, which notes that the Commission’s NPRM does not address the impact on basic tier-PEG viewers in government institutions such as schools, libraries and public buildings.¹⁵ Cable operators must be required to provide free set-top boxes or devices required by institutional subscribers.

¹⁴ / *Comcast adds new channels with digital enhancements*,” by: David P. Willis, posted on: November 16, 2011, Asbury Park Press at: <http://blogs.app.com/inthemoney/2011/11/16/comcast-adds-new-channels-with-digital-enhancements/>.

¹⁵ / *In the Matter of Basic Service Tier Encryption Compatibility Between Cable Systems and Consumer Electronics Equipment*, MB Docket No. 11-169, PP Docket No. 00-67, Notice of Proposed Rule Making, released October 14, 2011 (“NPRM”) Comments filed by Alliance for Community Media, pp. 2-3 and at fn 6, dated November 28, 2011.

Schools, libraries and public buildings receive cable service under local/municipal cable franchise agreements, as one commenter¹⁶ noted that when Time Warner transitioned to digital format in South Texas communities, schools with old wiring could not support the higher frequencies that digital and possibly encrypted transmissions required.¹⁷ In those instances institutional users are not able to access the programming even with a “free box,” Rate Counsel agrees with the Commenter who urge that in those cases the cable operator should be required to make such users whole.¹⁸ Commenter, The City of Boston, Massachusetts voices similar concerns, and posits that the Commission’s NPRM underestimates the number of set-top boxes or devices that subscribers would be required to lease. In the case of government institutions the leasing of equipment could impose sizable costs on schools and local communities and they may not be in a position to bear these costs under current budget constraints, nor should they. As a matter of public policy, in light of the substantial savings that are estimated to flow to cable operators, cable operators should bear the subscriber equipment costs associated with encryption. Additionally, encryption could potentially adversely affect PEG programming by permitting a cable operator to charge a PEG operator/programmer to have its PEG programming encrypted.¹⁹ Lastly, the NPRM does not consider the adverse affect on municipally negotiated franchise

¹⁶ / *In the Matter of Basic Service Tier Encryption Compatibility Between Cable Systems and Consumer Electronics Equipment*, MB Docket No. 11-169, PP Docket No. 00-67, Notice of Proposed Rule Making, released October 14, 2011 (“NPRM”) Comments filed by Alliance for Community Media, p. 2, dated November 28, 2011.

¹⁷ / *Id.*, p. 2 at fn 6.

¹⁸ / *Id.*

¹⁹ / *Id.*, Comments filed by the City of Boston, Massachusetts, pp. 6-7. *See also*: Comments by Alliance for Community Media at p.3, dated November 28, 2011.

agreements which call for certain Senior Discounts and fixed pricing negotiated by municipalities.²⁰

C. The Commission Must Ensure That Subscribers Are Kept Whole.

Moreover, Rate Counsel opines that before cable operators are permitted to encrypt basic service tier programming they should be informed and guided by the rules that the Commission adopted in its *Viewability Order*.²¹ Under the *Viewability Order*, in systems that are not all-digital, the equipment is provided at no cost to consumers and in all-digital systems, the Commission made equipment charges subject to review and contemplated a further proceeding to revisit what charges would be permitted.²² Several cable operators are charging for DTAs in systems that are not all-digital. This appears to conflict with the *Viewability Order* and the Commission should open up a proceeding to determine whether consumers have been improperly charged for DTAs.

Rate Counsel noted in its Initial Comments that the Commission in the *Viewability Order* required that broadcast signals must be viewable on all television receivers of a subscriber who subscribes to cable service.²³ The FCC found that there are over 40 million homes with 120

²⁰ / *In the Matter of Basic Service Tier Encryption Compatibility Between Cable Systems and Consumer Electronics Equipment*, MB Docket No. 11-169, PP Docket No. 00-67, Notice of Proposed Rule Making, released October 14, 2011 ("NPRM"), Comments filed by the City of Boston, Massachusetts, pp. 2-5, dated November 28, 2011 .

²¹ / *In the Matter of Carriage of Digital Television Broadcast Signals, Amendment to Part 76 of the Commission Rules, Third Report and Third Further Notice of Proposed Rule Making*, CS Dkt. 98-120, 22 FCC Rcd. 21064 (rel. Nov. 30, 2007) (DTV Viewability Order).

²² / *Id.*, at Section B. Availability of Signals – Section 614(b) and 615(h), ¶ 15 pp.21069-21070 and ¶ 17 at p.21071.

²³ / *Id.*, at ¶ 18 pp. 21071-21072.

million analog cable television sets.²⁴ The proposed rule that offers limited free equipment offered for limited periods is not in the public interest. The FCC should follow the policy adopted in the *Viewability Order* and require that free equipment be provided to each customer that needs such equipment to view the basic service on all television sets in the household. The cable operators have failed to provide sufficient information to support the limitations set forth in the proposed rule. Therefore, the FCC should modify the proposed rules consistent with Rate Counsel's recommendations.

D. The Commission Must Mitigate Adverse Cost Impact on Subscribers Should Cable Operators Be Allowed to Encrypt the Basic Service Tier.

Concern has been raised in various comments including the comments filed by Public Knowledge and Media Access Project which urges that the Commission take certain steps to further protect subscribers from unfair pricing and "bill shock."²⁵ Rate Counsel submits that if the FCC adopts Rate Counsel's recommendations "bill shock" would not be an issue.

Based on the foregoing, Rate Counsel recommends at the very least that cable operators be required to:

- 1) require operators to provide the cost savings data and projected increased revenue data from enhanced digital offerings due to increased bandwidth post encryption, as well as the number of subscribers, households and public institutions which would be affected in their footprints and the number of units/set-top boxes or devices that these subscribers would need to continue to receive uninterrupted basic service tier channels on all existing television sets at these locations;
- 2) require operators to provide the equipment necessary to view the basic service tier for all television sets at no cost as long as consumers have television sets that

²⁴ / Statement of Chairman Kevin J. Martin, in the *Viewability Order* p. 21124.

²⁵ / *In the Matter of Basic Service Tier Encryption Compatibility Between Cable Systems and Consumer Electronics Equipment*, MB Docket No. 11-169, PP Docket No. 00-67, Notice of Proposed Rule Making, released October 14, 2011 ("NPRM"), Comments filed by the Public Knowledge and Media Access Project pp. 3-4 and pp. 8-11, dated November 28, 2011

require equipment to view the encrypted basic service tier and as long as the basic service tier remains encrypted given the estimated billions of dollars in cost savings and benefits cable operators will experience if permitted to encrypt the basic service tier;

- 3) prohibit equipment fee charges on consumers and require that any equipment needed be provided at no cost to consumers. If the FCC permits charges on consumers such charges should be subject to review by the Local Franchise Authority (“LFA”) in the FCC Form 1205 process under Section 623(b)(3)(A)²⁶; or reviewable by the FCC where the LFA no longer has authority to review rates, to require that costs be allocated to all services benefiting from the availability of additional bandwidth in accordance with Section 623(a)(6)²⁷ and Section 623(j)²⁸; and
- 4) utilize the approach currently employed by the Lifeline/Linkup Program to determine eligibility; and participants should receive any required equipment at no charge and with no time limitation imposed.
- 5) ensure that PEG programming is protected by not permitting a cable operator to charge a PEG operator/programmer to have its PEG programming encrypted.²⁹

III. CONCLUSION

For the reasons set forth above, Rate Counsel submits that prohibition on encryption of the basic service tier can be waived for all-digital systems, but only if cable operators are required to provide equipment at no cost to customers so that the basic service tier can be viewed

²⁶ / 47 U.S.C. § 543(b)(3)(A).

²⁷ / 47 U.S.C. § 543 (a)(6).

²⁸ / 47 U.S.C. § 543 (j).

²⁹ / *In the Matter of Basic Service Tier Encryption Compatibility Between Cable Systems and Consumer Electronics Equipment*, MB Docket No. 11-169, PP Docket No. 00-67, Notice of Proposed Rule Making, released October 14, 2011 (“NPRM”), Comments filed by the City of Boston, Massachusetts, pp. 6-7 *See also* Comments by Alliance for Community Media at p.3, dated November 28, 2011.

on all television sets in households and/or public institutions for as long as the basic service tier is encrypted.

Very truly yours,

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